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2013 IL App (3d) 110831-U

Order filed December 16, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 21st Judicial Circuit,
)	Kankakee County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-11-0831
v.)	Circuit No. 11-CF-123
)	
KENNETH C. MURRELL,)	Honorable
)	Clark E. Erickson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The State failed to prove beyond a reasonable doubt that defendant's delivery of a controlled substance was within 1,000 feet of a building used primarily for religious worship.

¶ 2 Following a jury trial, defendant, Kenneth C. Murrell, was found guilty of unlawful delivery of a controlled substance within 1,000 feet of a church. 720 ILCS 570/401(c)(2), 407(b)(1) (West 2010). Defendant was sentenced to 18 years' imprisonment. On appeal, defendant argues that: (1) the State did not prove beyond a reasonable doubt that he committed

the offense within 1,000 feet of a church; and (2) his sentence was excessive. We affirm as modified and remand the cause for resentencing.

¶ 3

FACTS

¶ 4 On March 25, 2011, defendant was charged by indictment with unlawful delivery of a controlled substance within 1,000 feet of a church. 720 ILCS 570/401(c)(2), 407(b)(1) (West 2010). The cause proceeded to a jury trial on June 20, 2011, but resulted in a hung jury.

Defendant's second jury trial commenced on September 19, 2011.

¶ 5 The evidence at trial established that on March 6, 2011, defendant sold cocaine to a confidential informant. The transaction took place in the parking lot of a Dollar General in Kankakee. Kankakee City police officer Kris Lombardi surveilled the drug transaction from across the street. Lombardi testified that the drug transaction took place 494 feet from the International Healing and Deliverance Center (Center). Lombardi was asked if the Center "is a church." He responded "yes," and the trial court overruled the defense's hearsay objection. Lombardi testified that on the night of the offense, he measured the distance from the location of the drug transaction to the "southwest corner of the church," located at 595 South West Avenue in Kankakee. Lombardi confirmed that as a police officer he was aware of the locations of churches and parks within the area.

¶ 6 The jury found defendant guilty of unlawful delivery of a controlled substance within 1,000 feet of a church. 720 ILCS 570/401(c)(2), 407(b)(1) (West 2010). The trial court sentenced defendant to 18 years' imprisonment. Following the court's denial of defendant's motion for a new trial and motion to reconsider sentence, defendant appeals.

¶ 7

ANALYSIS

¶ 8 In challenging his conviction, defendant does not dispute that he unlawfully delivered a controlled substance, but instead argues that the State failed to prove that he committed the offense within 1,000 feet of a church. Therefore, defendant seeks to reduce his conviction from a Class X to a Class 1 felony.

¶ 9 When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Ross*, 229 Ill. 2d 255 (2008). The trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *Id.* We will not set aside a defendant's conviction unless the evidence was so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d 1.

¶ 10 Section 401(c)(2) of the Illinois Controlled Substances Act (Act) makes it a Class 1 felony to deliver more than 1 gram but less than 15 grams of any substance containing cocaine. 720 ILCS 570/401(c)(2) (West 2010). Section 407(b)(1) of the Act enhances this offense to a Class X felony if the violation occurs "within 1,000 feet of the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship." 720 ILCS 570/407(b)(1) (West 2010). The word "church" under the Act has been held to mean "a place used primarily for religious worship." *People v. Sparks*, 335 Ill. App. 3d 249, 256 (2002). Although the word "church" need not be included in a building's official title to establish

the building as a church (*Sparks*, 335 Ill. App. 3d 249), a rational trier of fact may infer that the building is a church used primarily for religious worship when the building is by name a church (*People v. Foster*, 354 Ill. App. 3d 564 (2004)).

¶ 11 Here, defendant argues that the State failed to prove beyond a reasonable doubt that the offense was committed within 1,000 feet of a church because the evidence was insufficient to establish: (1) the Center was a church within the meaning of the Act because Lombardi did not demonstrate that he had personal knowledge it was a church; and (2) the Center was being used as a church at the time of the offense. We agree.

¶ 12 At trial, it was established that defendant delivered cocaine within 494 feet from a building called the International Healing and Deliverance Center. Although Lombardi referred to the Center as a "church" during his testimony, the word church was not included in its name. Thus, the Center's name alone does not permit an inference that it was being used primarily for religious worship. *Cf. Foster*, 354 Ill. App. 3d 564 (holding that a building called "New Hope Church" permitted the trier of fact to infer that it was a church used primarily for religious worship based on its name).

¶ 13 Additionally, Lombardi's testimony that the Center "is a church" and that as a police officer, he was familiar with the locations of churches within the area was insufficient to prove that the Center was operating as a church. We find *People v. Cadena*, 2013 IL App (2d) 120285, instructive to the case at bar. In *Cadena*, the court reversed a defendant's conviction based on a locality enhancement where the State failed to establish that the church in question was active on the date of the offenses and how the officer knew that the building was being used as a church. *Id.* The court held that to prove a locality enhancement under the Act, an officer must

demonstrate and explain his personal knowledge of the location in question, not merely state that he is a police officer with a certain number of years of service. *Id.*

¶ 14 Like the testimony presented in *Cadena*, Lombardi testified that the Center was a church without further explanation to establish his personal knowledge of this fact. Similarly, Lombardi's statement that he was familiar with churches in the area failed to demonstrate the basis of this familiarity, other than his occupation as a police officer. See *Cadena*, 2013 IL App (2d) 120285; see also *People v. Boykin*, 2013 IL App (1st) 112696 (finding evidence insufficient to establish officers' personal knowledge that building was operating as a school under the Act where there was no testimony that they lived in the area or regularly patrolled the neighborhood).

¶ 15 Even assuming Lombardi's testimony was sufficient to establish that the Center was a church, the State failed to prove that the Center was being used as a church at the time of the offense. Lombardi testified that he measured the distance from the drug transaction to the Center on the night of the offense, thereby establishing that the Center existed at the time of the offense. However, the only testimony establishing that the Center was being used as a church on the date of the offense was Lombardi's statement that the Center "is a church." The use of the present tense suggests that the Center was being used as a church at the time of trial, but failed to address the Center's status on the date of the offense. See *Cadena*, 2013 IL App (2d) 120285, ¶ 16 (finding an officer's confirmation that the church "is an active church" lacked temporal context and could have referred to the time of trial rather than the date of the offenses).

¶ 16 Under these circumstances, we find the evidence insufficient to establish that the Center was a church being used primarily for religious worship at the time of the offense. Accordingly, we modify defendant's conviction from a Class X to a Class 1 felony for unlawful delivery of a

controlled substance (720 ILCS 570/401(c)(2) (West 2010)), and we remand the cause for resentencing. Since we have reduced defendant's conviction and he must be resentenced, it is unnecessary for this court to address defendant's argument that his sentence was excessive.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed as modified, and the cause is remanded for resentencing.

¶ 19 Affirmed as modified; cause remanded.